Filed 7/15/20 In re O.T. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

IN RE O.T., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B299960 (Super. Ct. No. YJ38610) (Los Angeles County)
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. O.T., Defendant and Appellant.	

O.T. appeals the juvenile court's order sustaining a wardship petition charging him with one count of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)) and three counts

[1] All statutory references are to the Penal Code unless otherwise stated.

of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). (Welf. & Inst. Code, § 602.)[2] The court ordered that appellant be placed in a camp community program for five to seven months with a maximum period of confinement of 29 years. Appellant contends the evidence is insufficient to support the findings that he committed the assaults charged in counts 3 and 4. He also contends the court erred in failing to declare whether his assault offenses were felonies or misdemeanors. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 16, 2019, appellant was living in an apartment with his mother Davisha Stephen and his great-grandparents James Stephen and Dolores Gregorio. Late that night appellant became angry at James, poked him in the eye, and hit him in the head and ribs with a pair of pliers. When Gregorio told appellant to stop hitting James, appellant began choking her with both of his hands. When Davisha tried to pull appellant away from Gregorio, appellant poked Davisha in the right eye twice with his finger, then grabbed Gregorio by the head and began shaking her violently. While holding the pair of pliers in his hand, appellant said "No one is allowed to leave. If you try to leave, I'll kill you."

Appellant took everyone's cell phones and went outside. Davisha locked the door and called appellant's probation officer to report what had happened. James was subsequently treated

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[2] The court also sustained a wardship petition charging appellant with committing a carjacking (Pen. Code, §§ 215, subd. (a)) with gang and personal firearm use allegations (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (b) & (e)(1)). Appellant does not challenge this ruling on appeal.

by paramedics for a bleeding laceration on his head. When Davisha was interviewed by the police the next morning, she was crying and her right eye was visibly red and swollen.

At trial, Davisha denied that appellant had assaulted her, James, or Gregorio and also denied or could not recall telling the police otherwise. She claimed that appellant had merely pushed James after James tried to hit him and that appellant had accidentally poked her in the eye when she tried to hug him. She did not recall telling the police that appellant had poked her in the eye twice while directly facing her. Gregorio also denied at trial that appellant had choked her.

DISCUSSION

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support the juvenile court's findings that he committed an assault by means of force likely to produce great bodily against Gregorio (count 3) and Davisha (count 4). We disagree.

The standard of review of an insufficiency of the evidence claim is the same in juvenile cases as in adult criminal cases: "we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. [Citations.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "'We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence . . . and we must make all reasonable inferences that support the finding of the juvenile court. [Citation.]' [Citations.]" (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.)

Section 245, subdivision (a)(4), provides: "Any person who commits an assault upon the person of another by any means of

force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year. . . ." The term "great bodily injury" is defined as an "injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066; see *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748.) The circumstances must be likely to produce significant or substantial injury; physical contact and actual injury, however, is not required to support a conviction. (*People v. Brown* (2012) 210 Cal.App.4th 1, 7.) ""Likely" means "probable" or . . . "more probable than not."" (*People v. Russell* (2005) 129 Cal.App.4th 776, 787.) Where injuries do result, their nature is relevant in determining whether the force was likely to produce great bodily injury. (*Brown*, at p. 7.)

The evidence, when viewed in the light most favorable to the judgment, is sufficient to support the true findings on counts 3 and 4. As to the assault of Gregorio, Davisha and James both stated that appellant had choked Gregorio with both hands and shook her head violently. It is well-settled that force sufficient to choke a victim constitutes force that is likely to inflict great bodily injury and will thus support a conviction under section 245, subdivision (a)(4). (*People v. Armstrong*, *supra*, 8 Cal.App.4th at p. 1066; *People v. Covino* (1980) 100 Cal.App.3d 660, 667-668; compare *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1497 [act of rubbing a dull butter knife across the neck of the victim that did not break the skin and resulted in only a "'small scratch'" did not constitute sufficient evidence of force likely to produce great bodily injury].)

Appellant's citation to *People v. Duke* (1985) 174 Cal.App.3d 296, is unavailing. The assault in that case was

"based on appellant's use of a headlock to hold his victim while he touched her breast. The headlock made her feel 'choked' but did not cut off her breathing. She could still scream, and she did get away." (*Id.*, at p. 302.) Moreover, "[t]he victim did not describe an attempt to choke or strangle her." (*Ibid.*) The court also noted that the defendant only grabbed the victim momentarily and released her almost immediately and that she was in no danger from the force actually exerted to her body. (*Id.* at p. 303.)

No such facts are present here. As we have noted, appellant choked his elderly great-grandmother with both hands and shook her head violently. As James bluntly put it, appellant "choked the shit out of [the] lady." Contrary to appellant's claim, the court was not required to find that he intended to cause great bodily injury. (See, e.g., *People v. White* (2015) 241 Cal.App.4th 881, 885.)

The evidence is also sufficient to support the juvenile court's finding that appellant assaulted Davisha with force likely to produce great bodily injury. In arguing otherwise, appellant contends that "[w]hen [an] assault is committed by use of bare hands, the question of whether the assault was by means likely to result in great bodily injury generally turns on the injuries sustained by the victim." Appellant cites no authority for this proposition, and the law is to the contrary. As appellant recognizes, an assault by means of force likely to produce great bodily injury "may be committed without infliction of *any* physical injury, and even though no blow is actually struck. [Citation.]" (*People v. Wells* (1971) 14 Cal.App.3d 348, 358; *People v. Brown*, *supra*, 210 Cal.App.4th at p. 7.)

In any event, Davisha did suffer injuries. Appellant deliberately poked her in the eye, a highly vulnerable, delicate, and vital organ of the body. He did so not once, but twice.

Moreover, he exerted enough force to cause Davisha's eye to be red and swollen. The court could thus reasonably find beyond a reasonable doubt that appellant assaulted Davisha with force likely to produce great bodily injury.

Failure to Declare Assaults as Felonies or Misdemeanors

In his opening brief, appellant also contends for the first time on appeal that the juvenile court erred in failing to declare whether his assaults were felonies or misdemeanors, as provided in Welfare and Institutions Code section 702. After the opening brief was filed, our Supreme Court held that such claims are subject to forfeiture if not raised at or before disposition. (*In re G.C.* (2020) 8 Cal.5th 1119, 1130-1133.) The People assert that appellant's claim is thus forfeited, and appellant concedes the issue in his reply brief.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J. TANGEMAN, J.

Nancy L. Newman, Judge
Superior Court County of Los Angeles

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

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